In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4360

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellant

vs.

MON HIN, Appellee

Appeal from the United States District Court for the Western District of Washington, Northern Division

Honorable Jememiah Neterer, Judge

BRIEF OF APPELLE.

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ARGUMENT

The contentions made in the first portion of the argument on behalf of the appellant, from pages 5 to 12 of appellant's brief, are eliminated from the case by the position taken by the immigration

authorities, and shown and illustrated in the record of the Immigration Office and found as a part of the return made by the Commissioner to the writ.

Under the immigration law, the administrative officers charged with executing the law occupy a dual function, namely, that of prosecutor and of trier of the facts. In disposing of the case of the appellee, these officers made a record which we contend is binding upon the Government. If this record be read, it will disclose the fact that the rulings in the Immigration Office were made solely and wholly upon the theory that if the stepfather, Li Sing, is a merchant, then Mon Hin is entitled, as his foster son and stepson, to be admitted. This attitude as to the law clearly and distinctly appears from the Immigration Office record which is a part of the return of the appellant Commissioner of Immigration.

Mon Hin, the appellee, was excluded by the Immigration Officers because, as found by such officers (erroneously and arbitrarily) that Li Sing was not a merchant. We submit, therefore, that all of the contentions made on pages 5 to 12 of appellant's brief are outside the case and should be disregarded, and the case disposed of without regard to them.

The rule is well established that a litigant will not be allowed to change his position and theory of a case on appeal. In other words, it is our contention that the Government is bound by the record it made in the Immigration Office, and can not now re-try its case on appeal on a different theory. This is settled by numerous authorities:

Great Lakes National Bank vs. McClure, 176 Fed. 208;

Walker vs. United States, 139 Fed. 409, affirmed 148 Fed. 1022, on opinion of trial court.

In the case just cited, it is held that the United States is estopped by the course and conduct of officers in regard to matters within their charge. We also cite:

Canton Roll & Machine Co. vs. Rolling Machinery Co. of America, 155 Fed. 321-341;

In re City, 140 N. Y. Sup. 124.

Is Li Sing a Merchant?

It seems to us that a reading of the evidence in the immigration record can not fail to satisfy this court, as it satisfied Judge Neterer, that Li Sing, appellee's stepfather, is a merchant. He buys and sells fish, doing, of course, some work in the prepa-

ration of them for the market. This work, however, comes within the statutory definition of engaging in the performance of such manual labor as is necessary in the conduct of his business as such merchant. The manual labor necessary in drying and packing and shipping fish is as much necessary and proper in the conduct of business as is the work of opening groceries, weighing them out, preserving them from deterioration, or any other incidental work of a grocer.

The work done by Li Sing upon his sea foods is very similar to that done by a grocer who might buy foods in bulk and repack them for sale in small containers. The volume of business transacted is not the criterion, the test is the buying and selling of goods. It is nowhere ordained in the statute that in order to attain or preserve the status of a merchant a party engaged in buying and selling goods must sell his goods in the exact form in which he buys them. To sustain the ruling of the Board of Special Inquiry would in effect be legislation. Congress did not see fit to enact a provision to the effect that the goods bought by a merchant must be sold in exactly the same form in which they were purchased. The theory of the appellant would exclude a mer-

chant from the right to take and preserve and make fit for market any goods which had gotten wet or had otherwise met with damage. Not a witness testified to any work done by Li Sing with regard to his mercantile business, other than buying, preparing for market and selling sea foods.

The cases cited in appellant's brief are not in point for the reason that in all of them the fact appears that the Chinaman whose status as a merchant is in question, did not actually work in and about the business in which he was interested. A reading of these cases will disclose that in all of them the Chinaman claiming to be a merchant owned a small financial interest in a mercantile business but gave it no personal attention and worked elsewhere, either cooking, raising fruit or produce, or in some other gainful occupation. Not one of the cases cited approximates the facts in this case.

It is contended, of course, that the appellee is bound by the finding of the Board of Special Inquiry. This is the law in a proper case, but it is not the law that the Board of Special Inquiry may ignore, as they apparently did in this case, all the sworn testimony and make a finding of fact in direct opposition to all of the testimony

and which finding is not supported by any of the testimony. There is no dispute in this case over the facts.

In

Weedin vs. Banzo Okada, 2 Fed. (2nd Series) 321,

and in the case of

Ex parte Hosaye Sakaguchi vs. White, 277 Fed. 913,

this court defined the limits of review of the findings of the Immigration Board and the review of the testimony. In both these cases the court held that the findings of Immigration Officers made in the face of the uncontradicted evidence, and in opposition to all the facts, should be reviewed, and held that they were not binding.

We concede the rule to be that the court will not review findings made upon contradictory evidence, but where the findings find no support whatever in the evidence, but are directly opposed to all the evidence in the case, the court will not regard them as final and conclusive. Any other rule would work the grossest kind of injustice. It is repugnant to all sense of justice that an administrative board may say that a certain thing is true, although all the evidence demonstrates that it is not true;

or the converse, that they may say that a certain thing is not true when all the evidence establishes that the fact exists.

We submit that the case most closely approximating the facts in this case is that of

Ow Yang Dean vs. United States, 145 Fed. 801.

This is a decision of this court, and we submit that it is controlling and decisive of the case at bar. We also cite:

Tom Hong et al. vs. United States, 193 U. S. 517; 48 L. Ed. 772.

The test is the buying and selling of goods, and it is this that establishes the status of a merchant.

In *Ong Chew Long vs. Burnett*, 232 Fed. 853, the rule is laid down that the test is the buying and selling of goods and it is this that establishes the status of a merchant.

See also

Lew Toy vs. U. S., 242 Fed. 405;

Lew Sing Chang vs. U. S., 222 Fed. 195;

Lee Kahn vs. U. S., 62 Fed. 914;

Palmero vs. Tod, 296 Fed. 345 (C. C. A.);

Woo Hoo vs. White, 243 Fed. 541.

Appellant in his brief attempts to make much of the fact that some times Li Sing, the stepfather, assists his wife in the work of the laundry for a short period. It is in evidence that Li Sing owns this laundry. The contention made by appellant would forbid a Chinaman having a financial investment in any business other than that of a merchant to visit the same and supervise or assist for a short time in saving his investment from loss. We contend that no such narrow construction can be put upon the statute. No cases have been cited warranting any such narrow construction.

We respectfully submit that a reading of the record made in the Immigration Office can not fail to convince the court that the ruling of the trial judge is correct, and should be affirmed.

Respectfully submitted,

JAMES KIEFER,

Attorney for Appellee.